

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

75-4862
76-7550
UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

JOHN D. DAVIS,

Plaintiff-Appellant,

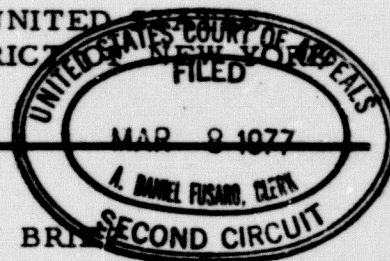
-against-

RJR FOODS, INC.,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED
DISTRICT COURT FOR THE SOUTHERN DISTRICT

PLAINTIFF-APPELLANT'S REPLY BRIEF



COLMAN & LINER
Attorneys for Plaintiff-Appellant
535 Fifth Avenue
New York, N. Y. 10017

Of Counsel,
Leon Liner
Milton A. Chambers
Robert F. Liner

(6159)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
JOHN D. DAVIS, :

Plaintiff-Appellant, :

-against- :

RJR FOODS, INC., :

Defendant-Respondent.
-----x

PLAINTIFF-APPELLANT'S REPLY
BRIEF

Both Davis and RJR recognize the importance of the opinion of Dartt v. Shell Oil Company (539 F. 2d 1256 (10th Cir. 1976)).

Each party to this appeal agrees that this decision stands for the proposition that it was not intended by Congress that "....The failure to file notice within the 180 day notice period [was] intended to be an absolute bar to bringing ADEA private action" (App. Br. p. 21; Appellee's Br. 8 to 11, 13).

The United States of America has intervened in Dartt (Supreme Court, Oct. Term, No. 76-678) and has petitioned for a writ of certiorari. Its brief in support of the 10th Circuit's stand, states that Dartt

"....presents to this Court for the first time the question whether the 180 day notice to sue provisions of the ADEA is subject to equitable tolling, or whether it must strictly be complied with as a jurisdictional prerequisite to private enforcement actions. That question has been the subject of considerable litigation in the lower courts and is of substantive and continuing importance. The holding in this case is in direct conflict with the holdings of two other courts of appeals, and of several district courts. While we believe that the decision in this case is correct, we believe that the issue presented is of sufficient importance to warrant review by this Court (Memorandum of The United States as Amicus Curiae on petition for writ of certiorari, p.7)."

Respectfully submitted,

COLMAN & LINER
Attorneys for Plaintiff-
Appellant.

Of Counsel,

Leon Liner
Milton A. Chambers
Robert F. Liner

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MIGUEL DINCEY, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1475 SHERIDAN
BROOKLYN, N.Y.

That on the 8 day of MARCH, 1977,
deponent personally served the within PLAINTIFF APPELLANT'S
REPLY BRIEF
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

DAVIS POLK & WARDWELL
ATTORNEYS FOR DEFENDANT-APPELLEE
ONE CHASE MANHATTAN PLAZA
NEW YORK, N.Y.

Sworn to before me this

8 day of March, 1977

M. Dincey
Michael DeSantis

MICHAEL DESANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978